Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

WILLIAM ALLEN ARNOLD,
Defendant-Appellant-Petitioner

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ORIGINAL PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

Subject Matter Jurisdiction

1. What does *defraud* mean?

2. Does 18 U.S.C. § 371 (*defraud*) alter that definition?

3. By what procedure is a crime defined?

   (Has the "Klein conspiracy" *ever* been a crime?)

Plea Agreements

4. Can an instantly self-breaching plea agreement support a judgment?

Evidence, Sentencing

5. Are ex parte presentations of purported "damages," offered for the first time at sentencing, *testimonial statements*?

6. Based on what evidence is the threshold "maximum sentence" determined, by which a subsequent upward (or downward) departure is then taken?

Double Taxation, Simultaneous Double Jeopardy

7. Can either judgment stand where they create "simultaneous double jeopardy?"

Parties

The court of appeals judgment(s) sought to be reviewed is (are) from the direct appeal(s) to the Eleventh Circuit, and the parties to the appellate proceeding are as follows:

Case No. 03-12810-DD

UNITED STATES OF AMERICA

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Appendix A (under separate cover)

(References to 1 App., 2 App., 3 App. and 4 App, are references to the Appendices filed in the 11th Circuit.)

Citations to decisions below

None

Jurisdiction

(i) Date Judgments Entered
Fleming: 4 November 2004 [+90: 2 February 2005]
Arnold: 6 November 2004

(ii) Rehearing, Extension None originally.
60 days (from 9 February 2005) granted to correct what turned out to be improper joinder of parties.

(iii) Rule 12.5 N/A

(iv) Statutes, Jurisdiction
Review by certiorari of decision by court of appeals, 28 U.S.C. §§ 1254(1), 2101(c).

(v) Regarding notice of statutory challenge, Rule 29.4(b)
Technical, strict-construction reading: no *Act of Congress* is challenged. To address the policy of Rule 29.4(b), even if both conditions precedent fail, it's a federal, hodgepodge *non-statute*, treated for 50 years as a statute, that is challenged.
Therefore, "28 U.S.C. § 2403(a) may apply;" this initial filing is served on the Solicitor General; and no prior, formal certification/notice, outside the normal course of litigation, has been issued.

Non-Argument Calendar Preferred

Oral argument is not expected to aid in the resolution of these issues.

Key Statutory and Charging Instrument Language

Title 18

Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or *to defraud the United States, or any agency thereof in any manner or for any purpose*, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 371 (2000) (emphasis added).

Internal Revenue Code

Section 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to *evade* or *defeat* any tax imposed by this title *or the payment thereof* shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

IRC § 7201 (2000) (emphasis added).

Section 7212(a). Attempts to interfere with administration of internal revenue laws

(a) Corrupt or forcible interference

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way *corruptly* or by force or threats of force (including any threatening letter or communication) *obstructs or impedes*, or *endeavors to obstruct or impede*, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

IRC § 7212(a) (2000) (emphasis added) (Internal Revenue Code of 1954, ch. 736, 68A Stat. 855 (**Aug. 16, 1954**)). *Cf. Klein*, 247 F.2d at 910-11 (superceding indictment—**Sep. 17, 1954**).

The so-called "Klein conspiracy" language

The "Klein conspiracy" language of Count One. *See* (2 App. Indictment 2 (¶ A)):

> to defraud the United States Department of the Treasury and the Internal Revenue Service (IRS) ... for the purpose of impeding, impairing, defeating, and otherwise obstructing the lawful functions of the IRS in the ascertainment, computation, assessment, and collection of federal taxes ... through deceit, craft, trickery and dishonest means.

Here's the same language divided into its primary components:

The "Larceny by Trick" Component.

to defraud the United States Department of the Treasury and the Internal Revenue Service (IRS) ... through deceit, craft, trickery and dishonest means.

The Added Mens Rea Component.

for the purpose of impeding, impairing, defeating, and otherwise obstructing the lawful functions of the IRS in the ascertainment, computation, assessment, and collection of federal taxes.

And, here is the same language, supplemented with the relevant source for each hodgepodge element:

The "Larceny by Trick" Component—Sources.

to defraud the United States Department of the Treasury and the Internal Revenue Service (IRS) [§ 371 (*defraud*)] ... through deceit, craft, trickery and dishonest means [larceny by trick, common-law; *Haas*; *Caldwell*].

The Added Mens Rea Component—Sources.

for the purpose of impeding [§ 7212], impairing [*Haas*], defeating [§ 7201; *Haas*], and otherwise obstructing [§ 7212; *Haas*] the lawful functions of the IRS [§ 7212; *Haas*] in the ascertainment [§ 7201 (valuation)], computation [§ 7201 (valuation)], assessment [§ 7201 (*payment*)], and collection [§ 7201 (*payment*)] of federal taxes. *See also Hammerschmidt.*

Citations to additional authority

FED. R. CRIM. P. 11, 32.

18 U.S.C.S. § 13 (Law Co-op. Supp. 2003).
18 U.S.C.S. § 3563(a) (Law Co-op. 2001).
18 U.S.C.S. § 3663A (Law Co-op. 2001).

28 U.S.C. § 3002 (2000).

31 U.S.C. §§ 321(d), 5101 (2000).

Statement of the Case

Trial Court Jurisdiction

If jurisdiction exists, 18 U.S.C. § 7.

TraffiCenter—The "Traffic Report" Ad Business

Lawful line of commerce.

Fleming started an advertising business new to the Jacksonville, Florida metropolitan area by setting up ad spots for national advertisers on "traffic reports." The business grossed approximately $600,000 annually. *See* (2 App. "Returns" 1 (Tab 4)); (4 App. "Numerics" (Tab 7)).

Lawful structure—politically incorrect.

Fleming set up a system of business trust entities, of which entities he was neither a trustee nor a beneficiary. Each relevant entity had its own EIN. For a summary of the entities, see (4 App. "Entity Chart" (Tab 8)).

Lawful activities—politically incorrect.

As a manager, Fleming paid the employees in cash, and he set up a checking account with a warehouse bank. He also set up some offshore trading accounts. The limited partnership of which Arnold was a limited partner purchased the business in April, 1996.

Non-reporting issue.

No "returns" were filed for any entity or individual.

Little doubt that these are the key facts that triggered the investigation.

The Confused Indictment

Whose "gross income?"

Not *Fleming's* (or Arnold's)! UNITED STATES OF AMERICA considered all the entities as shams and treated them as set aside ab initio. Then, Plaintiff created a new entity by commingling the funds of multiple business entities. Then Plaintiff attributed the created entity's "income" to Fleming, individually.

Plaintiff created "returns" for Fleming to sign, which

he *never* signed. The "returns" calculated a "tax" based not on what a "responsible party" would pay for any entity, per accounting methods and rates applicable to such entities, but rather upon shifting all the business "income" over to Fleming, individually, using MARRIED FILING SEPARATELY accounting methods and rates. (2 App. "Returns" (Tab 4)).

Yet, Plaintiff confessed from the outset that the "gross income" was not Fleming's, or *any* individual's, but rather that of the business entities. Paragraph C.14 is just one of the many statements that acknowledge this fact.

> 14. It was further part of the conspiracy that DONALD and JOYCE FLEMING failed to file federal individual, corporate,[1] trust or partnership[2] income tax returns in order to impede and obstruct the lawful tax assessment and collection functions of the IRS.

(2 App. Indictment 11 (¶ C.14)). *See also* Fleming's Response to Counsel's Second Motion to Withdraw, Point 13, pp. 25-31 ("Fleming's Brief").[3] Charging Fleming criminally for not filing returns for any *entity* recognizes the independence of each *entity's* duty, *and "income."*

Which parties? In what capacity? For what amount?

The indictment charges no entity and nowhere alleges any entity obligation. The indictment neither identifies nor charges any "responsible party" for any entity's alleged obligation. *See* (4 App. 'Entity Chart" (Tab 8)).

Fleming's Overtly Self-breaching Plea "Agreement"

See Fleming's Brief, Points 5-15, pp. 4-47.

The trial court granted Fleming's motion for self-representation, during which time he entered into the plea "agreement." Among the "agreement's" several problems, three jump instantly from the page.

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[1] "TraffiCenter was never incorporated." (2 App. "Plea Agmnt." 12).

[2] Fleming was never a partner of any relevant partnership.

[3] This brief, filed timely in early November, 2003, does not appear on the 11th Circuit's Docket Sheet.

No crime charged.

Count One charges a "Klein conspiracy," a non-offense.

No "property of the United States."

There is no factual basis for the plea. Not one fact alleged or "agreed" to identifies even one ounce of "property of the United States" acquired *at all*, much less wrongfully. United States was not defrauded!

Sentenced on SIX DISMISSED counts!

All counts except Count One, the "Klein conspiracy" count, were "agreed" to be "dismissed," yet Plaintiff's numerics included amounts found only in Counts Two to Five, plus the criminal "employment tax" charges found only in Counts Six (FUTA) and Seven (FICA).

Arnold's Trial

The jury instruction—*defraud.*

See Arnold's Brief, pp. 14-18, 42. "To 'defraud' the United States means to interfere with or obstruct one of its lawful government functions by deceit, craft or trickery." (4 App. Instructions 7).

Sentenced on DISMISSED counts!

Plaintiff offered no evidence of "damages" at *trial.* Plaintiff offered ex parte, during *sentencing*, the numerics used against Arnold, which numerics also include the "dismissed" criminal "employment tax" charges.

Sentenced on matters *not even charged!*

Plaintiff charged Arnold as a conspirator helping Fleming avoid *Fleming's* "taxes," 1993-1996, but Plaintiff's sentencing numerics against *Arnold* include 1997 and 1998, years never charged against Fleming! *See* Counts Two to Ten. Thus, Plaintiff confesses *from beginning to end* that the "gross income" is not *any* individual's but rather is the business entities'.

Punitive Double Taxation

For 1996, Plaintiff double-dipped. Plaintiff "taxed" Fleming, individually, on 100% of the business' income.

Plaintiff also "taxed" Arnold, individually, on *another 75%* of that *exact same* business income. *Cf.* (2 App. "Returns" 1 (Tab 4)) *with* (4 App. Numerics (Tab 7)).

Simultaneous Double Jeopardy

In reality, Fleming and Arnold were agents for the same principals (equity owners), and the "income" at issue is that of the entities, not of *any* individual. But, here, let's examine Plaintiff's internally confused view.

The factual focus is that of timing. A typical double jeopardy issue has a clear sequence. Here, the sequence suggested for the "double taxation" issue is artificial, in that it looks solely to sentencing dates. To sentence *Arnold* first, the "first" "tax" would be based upon the 75%; the punitive "second" "tax," on the 100%. The point is that the punitive "tax" and the incarceration are effectively simultaneous, given that they are based on the exact same count in the exact same case on the exact same "income" for the exact same year, 1996.

At Arnold's trial, Plaintiff offered evidence [4] that Fleming had "managerial control." "Control" establishes *legal* ownership, which "tax"-prosecutors use to justify "responsible party" liability for an *entity's* "tax." [5] But, by applying "pass-thru" treatment, Plaintiff treats Fleming as an *equitable* owner; [6] the same with Arnold.[7] Thus, the court, using Plaintiff's legal theories and numerics, simultaneously (A) "taxed," punitively, joint equitable owners of the *exact same* "income," *and* (B) incarcerated them. Thus, the "first" and "second" punishments of the same offense are indistinguishable in time.

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[4] Pounding the point so repetitiously that even Bettman got sick of it.
[5] *See* IRC §§ 641(b), 6672. But Plaintiff never even alleged, much less proved, any *entity's* "tax." The *"tax"* is transferred, *not* the *"income."*
[6] *Cf.* IRC §§ 652(a), 662(a), 667(a). Fleming is not an *equitable* owner; not of the entity Plaintiff created or of the actual entities. (4 App. "Entity Chart" (Tab 8)). *Cf.* (2 App. "Plea Agmnt" 12-13).
[7] This case nowhere even remotely complains of *Arnold's* "taxes," and to talk about ownership at all is to talk about the entities.

Argument

Remedies Requested

Release Pending Appeal.

Petitioners request release pending conclusion of the appellate process.

Reversal of Judgment.

Petitioners request reversal of the appellate opinions and of the judgments and sentences against them.

Summary

Even Klein didn't commit a "Klein conspiracy!"

Defraud has roots in the common-law, with a history closely linked to "larceny by trick." "Obstruct or impede" appears nowhere in 18 U.S.C. § 371. *But cf.* IRC § 7212(a).

The so-called "Klein conspiracy" was first asserted by superceding indictment against Klein, only one month after the congress added IRC § 7212 in 1954. All "Klein conspiracy" variants start with 18 U.S.C. § 371 (*defraud*) for the "larceny by trick" actus reus. Then, the "for any purpose" mens rea is replaced with a *conjunctive*, multi-specific-intent, non-statutory mens rea cocktail, derived from selected elements of IRC §§ 7201 and 7212(a). Then, that mens rea cocktail *becomes* the actus reus, which tries to morph § 371 (*defraud*) into §§ 7201 and/or 7212(a), without having to address "intent to evade" or "corruptly." Even left alone, *defraud* is the wrong legal theory in the "income tax" setting. *Defraud* deals with wrongful *taking*. "Income tax" deals with wrongful *keeping*.

No crime?—no subject matter jurisdiction.

Perspective

"Drug"-case and "Tax"-case prosecutors.

This "tax" case was assigned to a successful Florida "drug"-case prosecution team, whose "drug" efforts are to supported and congratulated. But, the "drug"-case perspective produces a fundamental flaw for a "tax" case.

Since engaging in illegal drug activity is fully *illegal*, an entity set up to engage in that line of commerce is unlawful ab initio. Such entity is properly set aside, and, thus, factually, all of the activity, e.g., "income," is properly attributed to the individuals.

However, engaging in the ad business is fully *legal*. And entities set up to engage in the ad business are also fully *legal* ab initio. The entities have a lawful purpose. Enron is not set aside for its *transactions*; Microsoft, the same. Each of these entities has a lawful purpose.

Entities may be liable, under both Title 18 and the IRC, as principal or conspirator. If Enron or Microsoft had engaged in non-reporting, what "tax"-prosecutor would annihilate the entity and charge all the "income" to the CEO or CFO? "Managerial control," thus "responsible party" liability, is *completely* dependent on the existence of the entity. But, Plaintiff, as is habit in "drug" cases, ran over roughshod, demolished, annihilated, the entities. This "drug"-case treatment of entities renders *any* "tax" charges against such entities legally impossible.

Since the "gross income" at issue is that of the entities', not of any individual, by annihilating the fully *legal* entities, set up with independent EIN's, Plaintiff disclaimed any and all interests.

No entity?—no "responsible party," and no conspiracy.

No Subject Matter Jurisdiction

1. What does *defraud* mean?

For Questions 1 and 2, see Arnold's Brief, Points 1, 2 and 4 thru 7. (Fleming's Brief adopted these Points.)

The appellate opinion epitomizes the problem.

Cf. "William Arnold, proceeding pro se, appeals his sentence and conviction for conspiracy to defraud the United States, in violation of *18 U.S.C. § 371*" (Arnold Op. pp. 1-2) (emphasis added) *with* (A) "the district court's

definition of *fraud*" (*id.* p. 2) (emphasis added), (B) "taxes that Fleming *evaded*" (*id.* p. 4) (emphasis added) *and* (C) "Under § 2T4.1(G), a defendant who is found guilty of *tax evasion*" (*id.* p. 5) (emphasis added).

Tax evasion is defined by IRC § 7201, *not* 18 U.S.C. § 371, and there are two types, *valuation* and *payment*, for which the evidentiary standards are *quite* different. The *payment* case requires an assessment. *See England*, 347 F.2d 425. This is *not* a "§ 371 (*US law*)—§ 7201" case!

Common-law canon.

Defraud is rooted in the common-law, meaning that the canon applies. *Neder*, 527 U.S. at 21-25; *Carter*, 530 U.S. at 264-67; *Morissette*, 342 U.S. at 250-63, in particular 260-63.

Defraud—By the elements.

Defraud is defined by its canonical elements this way:

(1) to *acquire*

(2) property (rights)

(3) known by the accused to be property not owned by the accused

(4) by trick or deceit (i.e., without consent),

(5) with the intent to *acquire* the property wrongfully. *See Bell*, 462 U.S. at 358-60 (larceny definitions); *Haas*, 216 U.S. 462 ("exclusive use" information); *Morissette* 342 U.S. 246 (mens rea, personal property); *Hyde & Schneider*, 225 U.S. at 350-54 (land); *Dennis*, 384 U.S. at 860-62 (use of NLRB facility under false pretenses).

Conclusion.

To *defraud* is to *acquire* [8] property wrongfully. *Tax evasion* deals with *keeping* property wrongfully. A perceived failure of a duty to *pay over* a "tax" does not even remotely ask about *acquisition*.

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[8] Otherwise, § 371 (*defraud*) and "§ 371 (US law)—IRC § 7201" define the same crime, meaning that the crime is doubly defined.

2. Does 18 U.S.C. § 371 (*defraud*) alter that definition?

Narrowing Element (2).

What § 371 (*defraud*) does, and *all* that § 371 (*defraud*) does, is *narrow* element (2), as follows:

(2) property (rights) *of the United States or an agency thereof.*

The 11th Circuit applies the common-law canon ...

> In *McNally v. United States*, 483 U.S. 350 ... (1987), the Supreme Court held that wire and mail fraud statutes protect only property rights, and that the words "to defraud," as used in the statutes, "usually signify *the deprivation of something of value* by trick, deceit, chicane or overreaching." *Id.* at 358 ... (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188, ... (1924)) [internal quotes omitted].

Poirier, 321 F.3d at 1029 (emphasis added).

... except in the "income tax" context.

Here's the jury instruction: "To 'defraud' the United States means to interfere with or obstruct one of its lawful government functions by deceit, craft or trickery." *See* Arnold's Brief, pp. 14-18, 42. (4 App. Instructions 7).

Two problems. (A) Actus reus *substitution*: "interfere with or obstruct" for "wrongful *acquisition*." *Cf.* § 7212(a). (B) Interfere, obstruct, etc., are *mens rea* elements! *Haas*.

Cf. "Regardless, because a violation of § 371 does not require the wrongful acquisition of property" (Arnold Op. p. 4) (11th Cir. 2004) *with* "The Legal Theories in Proper Application," *infra*, p. 13, featuring *Dennis* (1966), *Sans* (11th Cir. 1984) and *Harmas* (11th Cir. 1992).

The infamous sentence from *Haas*.

> The statute [now § 371 (*defraud*)] is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government.

Haas, 216 U.S. at 479.

Here is the sentence again, with two different focuses highlighted. **The bold highlights the Court's point.** *The italics show the root of the mens rea cocktail.*

> **The statute is broad enough** in its terms **to include any conspiracy** *for the purpose of impairing, obstructing or defeating the lawful function of* [i.e., **targeting**] **any department** of government.

The *Hammerschmidt* context—no *financial* loss.

Recognizing this difference, the Court in *Hammerschmidt* stated this:

> We think the words relied on cannot be given such a wide meaning when we consider the case to which they are applied, and when we replace them in the context.

Hammerschmidt, 265 U.S. at 186.

Here's the context. The indictments in *Haas* charged essentially the same type larceny offense described in *O'Hagan*, 521 U.S. 642 (unauthorized use of "exclusive use only" information). *Haas*, 216 U.S. at 477-78. In *Haas*, the "exclusive use only" information was "owned" by the Department of Agriculture! *Id.* at 479-80. Thus, the defendants committed *larceny* against the agency, rendering the *defrauding* charge *fully* applicable.

In response, Haas argued that *defrauding* must result in a *financial* loss. The Court held otherwise, and *this* is where we find the immediate context.

> These counts do not expressly charge that the conspiracy included any direct pecuniary loss to the United States, but as it is averred that the acquiring of the information and its intelligent computation, with deductions, comparisons and explanations involved great expense, it is clear that practices of this kind would deprive these reports of most of their value to the public and degrade the department in general estimation, and that there would be a real financial loss. But it is not essential that such a conspiracy

> shall contemplate a financial loss or that one shall result. [The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government.]

Hammerschmidt, 265 U.S. at 187 (quoting *Haas*, 216 U.S. at 479). The Court neither *remove* the actus reus of "wrongful *acquisition*" nor *add* any mens rea. Nor do they *substitute* a mens rea cocktail for the actus reus!

Recognition of § 371's scope.

Thus, *Haas* teaches two points.

Lesson 1. No *financial* loss required. Intangible property interests are just as protected as tangible.

Lesson 2. The great stumbling block during the past 50 years is misreading *Haas* regarding the *scope*. The *scope* is not limited solely to "property of the *United States*," for it protects the *agencies'* property, as well.

Improper use of "exclusive use only" information is larceny. No additional, tangible, *financial* loss need be proved. And, by applying the statute's *scope*, the Court *is not* redefining *defraud*. They neither add the mens rea of "for the purpose of impairing, obstructing or defeating," nor eliminate the "wrongful *acquisition*" element. The Court confirms the *scope* by recognizing "**any conspiracy [to *defraud* that targets] any department.**" *Haas applies*, rather than *alters*, the ancient canon.

Another illustration of recognition of the *scope* of the statute is *Caldwell*, which provides a perfect example of both the problem and the fix. *Caldwell* boldly cites *Haas* as authority for *Haas*' exact *antithesis!* "The conspiracy need not aim to deprive the government of property." *Caldwell*, 989 F.2d at 1058 (focus added). What *Haas* actually says is that such conspiracy "need not aim to deprive the United States of property," which is true because the statute's *scope* includes any conspiracy that aims to deprive *any "agency"* of property, as well.

"United States" + "agencies" = "government"

Thus, the fix is simple: change the generic reference to the specific name; i.e., to apply this statute's intended scope, distinguish United States from its "agencies." By doing so, we apply properly Lesson 2 from *Haas*.

Hammerschmidt also applies the proper *scope*, as shown in the analysis that distinguishes between tangible and intangible property interests, as discussed in *Haas*.

> To conspire to defraud the United States, means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental function by deceit, craft or trickery, or at least by means that are dishonest [the *Haas* mens rea *becomes* the actus reus!]. It is not necessary that the government shall be subject to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention. It is true that the words "to defraud" as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching. They do not extend to theft by violence. *They refer rather to wronging one in his property rights by dishonest methods or schemes.* One would not classify robbery or burglary among frauds. In *Horman v. United States*, 116 Fed. 350, § 5480, Rev. Stats. as amended March 2, 1889, c. 393, 25 Stat. 873, [the court construed the *mail fraud* statutes to include blackmail.] The decision, however, went to the verge and should be confined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose. ... *Its construction in the Horman Case cannot be used as authority to include within the legal definition of a conspiracy to defraud the United States a mere open defiance of the governmental purpose to enforce a law*

by urging persons subject to it to disobey it.

Hammerschmidt, 265 U.S. at 188-89 (emphasis added).

The necessary scope of *defraud* in the mail fraud context *does not* expand *defraud* in the § 371 context.

> No conspiracy exists without a substantive offense. It should require no citation of authority to say that a person cannot conspire to commit a crime against the United States when the facts reveal that there could be no violation of the statute under which the conspiracy is charged.

Galardi, 476 F.2d at 1079 (construing § 371 (US law)).

> The common-law rule that the substantive offense, if a felony, was merged in the conspiracy [footnote omitted], has little vitality in this country. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. [citations omitted]. A conviction for the conspiracy may be had though the substantive offense was completed. [citations omitted]. And the plea of double jeopardy is no defense to a conviction for both offenses. [citations omitted]. ... It [the conspiracy] has ingredients, as well as implications, distinct from the completion of the unlawful project. ... [Some overt acts are perfectly legal; some illegal.] The agreement to do an unlawful act is even then distinct from the doing of the [illegal] act [in furtherance of the conspiracy]. [footnote omitted].

Pinkerton, 328 U.S. at 643-44.

The merger theory exists because the conspiracy and its substantive offense are symbiotically related. No conspiracy exists until a defined crime is the objective.

> A conspirator must intend to further an endeavor which, if completed, would satisfy *all the elements of a substantive criminal offense*, [and] it suffices that he

adopt the goal of furthering or facilitating the criminal endeavor.

Salinas, 522 U.S. at 65 (emphasis added).

Section 371 (*defraud*) requires objective of *defrauding*.

GENERIC CONSPIRACY ELEMENTS DEFINE NOTHING.

The generic elements are these:

(1) the existence of an agreement to achieve an unlawful objective;

(2) the defendant's knowing and voluntary participation in the conspiracy; and

(3) the commission of an overt act in furtherance of the conspiracy.

Harmas, 974 F.2d at 1267 (quoting *Cure*, 804 F.2d at 628-30). *Cf. Adkinson*, 158 F.3d at 1153 (Arnold Op. p.4) (*overt* act, conspiracy/agreement). What's still missing is identification of a substantive offense as the objective. No conspiracy is even defined without its substantive offense.

"CONSPIRACY TO DEFRAUD" ELEMENTS.

The elements for the § 371 (*defraud*) conspiracy are logically defined and completed this way:

(1) the existence of an agreement [to *defraud* the United States (or an agency thereof)];

(2) the defendant's knowing and voluntary participation in the conspiracy [to *defraud*]; and

(3) the commission of an overt act in furtherance of the conspiracy [to *defraud*].

The Legal Theories in Proper Application.

Harmas properly distinguishes the two disjunctive sanctions set forth in § 371, namely § 371 (*defraud*) and § 371 (US law). *Harmas*, 974 F.2d at 1266-68. *Harmas* also looks to *Sans*, 731 F.2d at 1533-35, to support (properly so) the notion that the *defraud* sanction need *not* refer to another statute, whereas the "United States law" sanction *necessarily* does. *Harmas*, 974 F.2d at 1266 (citing *Sans*, 731 F.2d at 1534). This follows from the fact

that the common-law canon supplies the definition of *defraud*. Per that canon, as cited, *supra*, Question 1, p. 7, *defraud* means and refers to a wrongful *acquisition*.

In full support of this entire line of analysis, *Harmas* cites *Dennis*. In *Dennis*, the target property interest sought by wrongful *acquisition* was "use" of the NLRB's facility. *Dennis*, 384 U.S. at 861-62. Thus, a "conspiracy to defraud" (complete with agreement "to *defraud*," voluntary participation and overt act) exists, because *defraud*, as defined by the common-law canon, exists, as follows: (1) *acquisition* (2) of property (rights) (here, "use" of the NLRB's facility (Lesson 2: scope intends to include "agency;" *Haas*, *Hammerschmidt*); "use" is an intangible interest, not necessarily tied to a *financial* loss (Lesson 1: *Haas*, *Hammerschmidt*)) (3) known by the accused not to be owned by the accused (4) by trick or deceit (false Affidavits), (5) with the intent to so acquire that property interest wrongfully. In sum, it's all there.

The elements of *defraud* all *existed* in *Dennis*. By *extreme* contrast, not *one* exists here. ***Not one!*** This happens where the legal theory applied is incompetent from the threshold. "Income tax" and *defraud* don't mix.

No *defrauding*?—no "conspiracy to defraud."

Conclusion.

Nothing about 18 U.S.C. § 371 (*defraud*) alters the common-law definition of *defraud*. In fact, outside the "income tax" context, *defraud* is applied quite correctly.

Thus, the "Klein conspiracy" language derives not from an alteration of *defraud*, but rather from a contortion of *Haas*, which contortion (A) *removes* the actus reus of "wrongful *acquisition*;" (B) *adds* a hodgepodge, multi-specific-intent, non-statutory mens rea cocktail (1) not found in 18 U.S.C. § 371 and (2) never even remotely found in the canon for *defraud*; and (C) *replaces* the actus reus with the mens rea cocktail. In short, via the "Klein conspiracy," the prosecution rewrites §§ 7201 and 7212(a), avoiding "intent to evade" and "corruptly."

3. By what procedure is a crime defined?

See Arnold's Brief, Point 4, pp. 27-35.

Standard of Review.

See Arnold's Brief, pp. 2-5.

"Whether an indictment sufficiently alleges a statutorily proscribed offense is a question of law. ... We review questions of law *de novo*." *Steele I*, 117 F.3d at 1233 (focus added) (citations omitted). *See also Steele III*, 178 F.3d at 1233.

If the "Klein conspiracy" *is* a statutory offense, i.e., if it's statutory for the executive (via the prosecutor) to replace the legislatively enacted "for any purpose" with a highly prejudicial, hodgepodge, multi-specific-intent mens rea cocktail, then the indictment is still fatally flawed and the judgments still properly reversed. Because *defraud* requires a wrongful *acquisition*, even if one presumes every single fact alleged in Count One to be true, it still alleges no *defrauding*. But, given the timing of the indictment (27 June 2000), and *Cotton*, 535 U.S. 625 (2002), which overruled *Ex parte Bain*, 121 U. S. 1, a question arises as to whether that error is *framework* and *structural*, thus a subject matter jurisdiction question (de novo review), or *constitutional*, hence a "merits" issue ("plain error" review). *Neder*, 527 U.S. 1 (1999); *Prentiss*, 256 F.3d 971 (10th Cir. 2001); *McCoy*, 266 F.3d 1245 (11th Cir. 2001); *Poirier*, 321 F.3d 1024 (11th Cir. 2003).

Has the "Klein conspiracy" *ever* been a crime?

"KLEIN CONSPIRACY" LANGUAGE IS NON-STATUTORY.

One readily finds 18 U.S.C. § 371, and one can distinguish between § 371 (*defraud*) and § 371 (United States law) just fine. Section 371 isn't the problem. First, "for any purpose" is replaced with a fanciful, multi-specific-intent mens rea cocktail, drawn from IRC § 7201 (both *valuation* and *payment*), and from IRC § 7212(a) (omnibus) (which depends upon "corruptly"), and from *Haas* (and *Hammerschmidt*), but not by legislative act. *Cf.*

Klein, 247 F.2d at 910-11. Then, as demonstrated by *both* the jury instruction *and* Fleming's plea "agreement" (*cf.* ¶ A.1 *with* ¶¶ 1 & 4, p. 11 *and* the last ¶, p. 16), the non-statutory mens rea cocktail *becomes* the actus reus! *Cf.* § 7212(a). In short, a "Klein conspiracy" is a prosecutorial rewriting of both §§ 7201 and of 7212(a).

DUE PROCESS "PRINCIPLE OF LEGALITY" IS VIOLATED.

There's a blatant violation of substantive due process, for there is no statute, thus no notice, no "fair warning." "The . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. [*Bouie*, 378 U.S. at 351 (quoting *Harriss*, 347 U.S. at 617.)]" *Lanier*, 520 U.S. at 265 and n.5. Each of these opinions analyzes an existing statute. Where an existing, published legislative act may be vague, and run afoul of the "principle of legality," a non-statutory mens rea cocktail must be all the more vague. *See City of Chicago v. Morales*, 527 U.S. at 55-56.

SEPARATION OF POWERS IS VIOLATED.

There's also an egregious separation of powers problem. A crime is defined only by legislative act. *Lanier*, 520 U.S. at 265-66 and nn.5, 6; *Bass*, 404 U.S. at 347-48 (rule of lenity—(1) common language (2) legislatively enacted). *Bass* distinguishes court-defined crimes from legislatively defined crimes. There's a thunderous silence regarding the executive, suggesting that it doesn't even come to mind to need to be mentioned that the executive doesn't define crimes. *See also Evans*, 333 U.S. at 486 and n.4 ("In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions.") Further, the scope of executive authority to be exercised under color of law, even under war powers and in a state of emergency, is specifically defined by statute. *Youngstown Sheet & Tube Co.*, 343 U.S. 579. The executive acts well beyond the scope of the employment

contract to purport to define a crime. Surely a trial court exceeds its authority even to acknowledge as a definition of a crime language dreamed up by the executive.

Even in this present state of "object or waive," there are certain challenges to the system's very structure that a defendant can *never* waive. Way at the top of that list is the objection to the executive's attempt to legislate. *Cruikshank*, 92 U.S. at 556-59 (overbroad indictment; prosecutor to follow, not create, the law; questions of law are for the court, not the prosecutor).

Executives have no authority to define crimes. *Industrial Union Dep't*, 448 U.S. at 672-77 (Rehnquist, J., concurring; citing *Field*); *Dennis* (1951), 341 U.S. at 525-26 ("those whose duty it is to legislate," p. 525) (Frankfurter, J., concurring). "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Field*, 143 U.S. at 692; *Schick*, 419 U.S. at 273-76 (Marshall, J., dissenting) (no authority to expand sentence by prohibiting parole).

> We enter perilous territory because, as stated in [*Gradwell*, 243 U.S. at 485] there is no common-law offense against the United States; "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." [*Hudson*, 11 U.S. (7 Cranch) at 34.] If a person is to be convicted of a crime, the offense must be clearly and plainly embraced within the statute. As stated by Chief Justice Marshall in [*Wiltberger*, 18 U.S. (5 Wheat.) at 105], "probability is not a guide which a court, in construing a penal statute, can safely take." It is one thing to allow wide and generous scope to the express and implied powers of Congress; it is distinctly another to read into the vague and general language of an act of Congress specifications of crimes. We should

> ever be mindful that "before a man can be punished, his case must be plainly and unmistakably within the statute." [*Lacher*, 134 U.S. at 628.]

Classic, 313 U.S. at 331-32 (Douglas, J., dissenting).

There are certain Due Process rights, substantive and procedural, that the courts are uniquely positioned to protect. The mere infringement or encroachment of separation of powers compels the exercise of the judicial power, *sua sponte* where necessary, within the context of the case or controversy, to curtail any executive's attempt to define a crime. "The territory to which the jurisdiction extends" represents even a different time, place and plane from the transitions Chief Justice Marshall witnessed, but surely he's still correct about the commonwealth's inherent authority of self-defense, held in sacred trust, that is the judicial power. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (the Court is limited *because* the legislature is limited); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (state legislative power limited by estoppel); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (state legislatures *and* executives derive authority *only* from terms specifically declared).

Conclusion.

The procedure by which a crime is defined is the legislative process.

The executive is prohibited, even under an emergency, even exercising so-called war powers, from defining a crime. There is nothing about a prosecutor's taking § 371 (*defraud*) and substituting a hodgepodge mens rea cocktail for an actus reus of ancient origin that remotely satisfies even a colorable exercise of legislative authority.

Since Count One, the sole count in Fleming's plea "agreement," and the sole count on which Arnold was tried, charges no violation of any statutory offense, the trial court never had subject matter jurisdiction over Count One. The judgments are properly reversed.

No Plea Agreement

4. Can an instantly self-breaching plea agreement support a judgment?

See Fleming's Brief, Points 5-15, pp. 4-47.

No crime charged.

Where the indictment doesn't charge a crime at all, the defect is jurisdictional. *Peter*, 310 F.3d at 712-13. Also, "a district court is without jurisdiction to accept a guilty plea to a 'non-offense.' " *Id.* at 713 (citing *Meacham*, 626 F.2d at 509-10). *See also Menna*, 423 U.S. at 62-63 and n.2 (non-offense due to application of Double Jeopardy; objection not waived by plea). Thus, a guilty plea does not waive the objection that the indictment fails to charge an offense. *Pease*, 240 F.3d at 942-43.

While *McCarthy*, 394 U.S. at 464-67, addresses a unique procedural issue, it still confirms the general concept that where the *court* can't "understand" (recognize, take jurisdiction over) a non-offense, there's no way a *defendant* can "understand" it, either.

No "property of the United States."

As discussed in Questions 1 and 2, the foundational substantive crime of *defrauding* was never even alleged. There is no wrongful *acquisition* even remotely at issue. Equally non-existent is any reference even to one ounce of "property of the United States."

Sentenced on SIX DISMISSED counts!

See Fleming's Brief, Points 16-19, pp. 48-52.

One "agreed" term, *see Benchimol*, 471 U.S. at 455, was that *all* counts except the "Klein conspiracy," Count One, were to be dismissed. (2 App. "Plea Agmnt."). But, *all* Plaintiff's numerics are from SIX DISMISSED counts!

There being no "property of the United States" at issue, much less wrongfully *acquired*, the maximum numeric amount is **$0.** To have *any* other amount is to

include DISMISSED charges in the numerics. To compare the "agreement" with the indictment, (2 App. Indictment), we find, by mere inspection, that the "income tax" amounts derive *not* from Count One, *defrauding*, but rather from DISMISSED Counts Two (1993), Three (1994), Four (1995) and Five (1996), which allege violation of IRC § 7201.

The criminal "employment tax" charges, Counts Six (FUTA) and Seven (FICA), were "agreed" to be DISMISSED, but the "employment tax" amounts feature *prominently* in Plaintiff's numerics.

Conclusion.

This preposterous, instantly, overtly, egregiously, self-breaching "agreement," which Plaintiff drew up, cannot possibly support a judgment. To look into the actual terms of the deal made is to see, by mere inspection, that the "agreement" is a sham. There being no agreement, there can be no judgment based upon it.

No Evidence; Ramshackle Sentencing

5. **Are ex parte presentations of purported "damages," offered for the first time at sentencing, *testimonial statements*?**

6. **Based on what evidence is the threshold "maximum sentence" determined, by which a subsequent upward (or downward) departure is then taken?**

What is a *testimonial statement*?

(*See* Arnold's Brief, Points 5-12, pp. 37-52.) This is the question left open in the recent analysis in *Crawford v. Washington*, 541 U.S. 36 (2004). Whether the definition is better supplied by description or by a seriatim listing of examples, this case contains the same problem.

Where "damages" evidence is not admissible per "judicial notice," such evidence must be *testimonial*.

This case focuses *entirely* on *Fleming's* "taxes." [9] Plaintiff first presented the numerics used against Arnold at sentencing. Arnold immediately objected, by way of Affidavit. Those numerics were never (A) agreed to, (B) introduced before the jury or (C) subjected to cross-examination. *Blakely v. Washington*, 542 U.S. —, 124 S. Ct. 2531 (2004). Therefore, the trial court's use of that inadmissible information is reversible error. *Id.*

The "maximum sentence" looks to what evidence?

As stated squarely in *Blakely*, where upward (or downward) departures must look to trial evidence, the threshold "maximum sentence" may be determined solely by trial evidence (or evidence otherwise agreed to). *Blakely*, 124 S. Ct. at 2536-38.

Here, the trial evidence of "property of the United States" *defrauded* is in the amount of **$0**, which happens also to be the amount originally pled in Count One, given that Count One pled no *defrauding* at all. Therefore, **$0** is the evidence on which the threshold "maximum sentence" could ever *possibly* be based. That's level 6, not 18.

Conclusion—Questions 5 and 6.

These two directly related evidence Questions focus on the relationship between trial and sentencing. Trial is very much irrelevant where sentencing looks to ex parte presentations never subjected to cross-examination and even to *new charges* nowhere found in the indictment! "Damages" evidence is *testimonial*; it must be admitted to or tried. "Maximum sentences," as with departures from the "maximum," must look solely to evidence admitted to or tried. To use any other information is error.

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[9] If *Fleming* "owned" it all, (4 App. Indictment ¶ C.11 p. 11), from where comes the *remotest* notion of *Arnold's* "taxes" for *any* year? With or without § 371, *where* is *Arnold* anywhere charged for *his* "taxes?!" DISMISSED Count Five focuses on *Fleming's* 1996 "taxes!"

Double Taxation, Simultaneous Double Jeopardy

7. Can either judgment stand where they create "simultaneous double jeopardy?"

See Arnold's Brief, Points 13-16, pp. 53-61 (Fleming's Brief, Points 20-23, pp. 53-54, adopting Arnold's Brief).

The Entity Plaintiff Created.

For this case, Plaintiff created a new entity by commingling funds from multiple business entities. Fleming never agreed to be responsible for that creation, as evidenced by his *never* signing the "returns" Plaintiff compiled. (2 App. "Returns"). *Cf.* (2 App. "Plea Agmnt").

The "Ownership" Plaintiff Created.

For 1996, Plaintiff attributed 100% of that *entity's* "income" to Fleming, and *another 75%* to Arnold. (2 App. "Returns" 1); (4 App. Numerics). Plaintiff "taxed" Fleming on the 100%, and "taxed" Arnold on *another 75%* of that *exact same* "income." In both cases, Plaintiff used "pass-thru" treatment, meaning that Plaintiff treated both Fleming and Arnold as simultaneous equitable owners of the exact same "income" of the entity Plaintiff created by way of commingling.

Simultaneous Double Jeopardy.

Thus, by Plaintiff's very own theory of ownership, this "double taxation" is facially punitive. *Kurth Ranch.* Punitive "taxation" plus incarceration gives rise to the double jeopardy issue. *Id.* Ordinarily, there'd be an identifiable sequence. Here, the punitive "taxation" and the incarceration arise from the two judgments on the exact same count in the exact same indictment regarding the exact same "income" for the exact same year, 1996. Nothing about different sentencing dates changes the fact that the sentences arise from the same count in the same indictment. And, per those judgments, the punitive "taxation" and the incarceration occur simultaneously.

Multiple punishments prohibited.

Multiple punishments for the same offense are unlawful. *Ex parte Lange*, 85 U.S. (18 Wall.) at 168-74; *North Carolina v. Pearce*, 395 U.S. at 717. *See also Kurth Ranch*, 511 U.S. at 778-84.

Double jeopardy normally operates to prevent the second punishment, but where the first and second punishments occur simultaneously, double jeopardy must operate to prevent both punishments. In short, both judgments must be set aside.

Named entities.

Anyone subject to criminal sanctions, whether directly or vicariously through an agent, *must* be afforded protection from the "witch hunt." In *Fong Foo* and *Martin Linen*, the entity (the agent) is a named party, and its owners (the principals) benefited from double jeopardy protection.

Entities not named.

What about the entity that is *not* a named party in the criminal suit? To look at equitable ownership and disclosed agency, where the equitable owners of the entity are at jeopardy via any agent, the equitable owners are in jeopardy, whether or not the entity is a named party. This is the principle applied in *Kurth Ranch*. The entity Plaintiff created is not a named party to this litigation.

Attachment.

When does jeopardy attach to an equitable owner of an entity, which entity is not a party to the criminal suit? When it attaches to any disclosed agent of that owner.

Both of the following examples are rather subtle on this point, but both clearly support this rule. In *Kurth Ranch*, the individuals were busted for marijuana. Ultimately, the entity, the Kurth Ranch, sought Chapter 11 bankruptcy protection. While Chapter 11 *is* available to individuals, it is not accidental that *all* the opinions on that matter are in the name of the *entity*, the Kurth

Ranch. The Montana "drug"-case team "taxed" the *entity*[10] pursuant to Montana's then new "dangerous drug" "tax" provision, which includes a threshold requirement that the party "taxed" first be arrested. *Kurth Ranch*, 511 U.S. at 770-71, 781-82. The *entity* was never charged, must less "arrested." Thus, for the *criminal* suit, the entity was *not* a named party, and the Court noted that the "proper party" issue was never raised at trial. *Id.*, at 772 n.9. Every single federal court involved denied Montana's effort to collect that "dangerous drug" "tax" in the bankruptcy proceeding.

The "proper party" issue being so predominant, the insightful double jeopardy discussion pales in comparison. Still, the Court ruled on the double jeopardy issue, judging the "tax" as punitive, making it subject to double jeopardy censure. Thus, regarding that one offense, the equitable owner(s) of the Ranch became subject to the prohibited *second* punishment when the *entity*, as an *agent*, became subject to its *first* punishment, in bankruptcy, via the punitive "tax." The Court properly censured the *second* risk, incarceration, to which at least one of the equitable owners was made subject.

We see the same type of "equitable owner"/agent connection in *Shotwell Mfg.* The entity is a named party, but the double jeopardy discussion focuses almost exclusively upon the "responsible parties." The double jeopardy issue was resolved instantly, because remand doesn't trigger double jeopardy. *Shotwell Mfg.* 355 U.S. at 243. However, by even reaching that ruling, the double jeopardy rule is applied, meaning that the *entity's* "tax" issue and the "responsible party's" double jeopardy protection are directly connected, which must be the case, given that the entity and its "responsible party" (*legal* interest owner) are both agents for the same principal(s) (the *equitable* interest owner(s)).

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[10] Which is the flip side to the "wrong party" problems in this case.

In short, when any equitable owner's disclosed agent is named in the criminal litigation, double jeopardy censure attaches to protect that equitable owner. Otherwise, the equitable owner is wide open to multiple punishments via *multiple and separate* punishments on multiple and separate agents for the same offense.

Plaintiff is hoisted by its own petard!

Staying completely within Plaintiff's fiction,[11] Plaintiff created the entity and then attributed equitable ownership to both Fleming and Arnold, via "pass-thru" treatment. While both a trust model and a partnership model apply, the partnership model is simpler. Where Fleming and Arnold are partners in the entity Plaintiff created, each is also an agent of the partnership. Thus, applying *Kurth Ranch*, a punitive "tax" on the whole of the partnership's "income" triggers double jeopardy protection for all who are considered simultaneous owners of that exact same income. Once a punitive "tax" exists or incarceration, the other is a second punishment.

In *Kurth Ranch*, the sequence was clear. Here, the punitive "taxation" and the incarceration occur in the same judgment. And, since the sentencing dates provide an artificial sequence for these purposes, the double sentences on the same offense occur at the same time.

Conclusion.

These judgments exact a punitive "tax" and order incarceration for the same offense at the same time. Since multiple punishments for the same offense are unlawful, and since it's not legally possible to distinguish the "first" from the "second" punishments here, it follows that both punishments must be set aside, meaning that both judgments must be set aside.

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[11] The argument on appeal mixed the reality in with the fiction. Staying completely within the one or the other tends to produce an internally consistent picture that is easier to describe.

Conclusion

The United States court of appeals has upheld the executive's redefining of *defraud*, for 18 U.S.C. § 371 (*defraud*) in the "income tax" context, which (A) removes the actus reus of "wrongful *acquisition*," (B) adds a hodgepodge, multi-specific-intent mens rea cocktail, and (C) substitutes that mens rea cocktail for the actus reus. This construction conflicts with the ancient common-law canon, with longstanding federal law, with relevant decisions of this Court, with relevant decisions of other courts of appeals and even with its own precedent.

By not requiring that a conspiracy specifically identify, from the indictment forward, a (statutorily) pre-defined offense as its objective, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court and with relevant decisions of other courts of appeals, and (2) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

Whether the "Klein conspiracy" language even defines a crime is an important question of federal law that has not been, but should be, decided by this Court.

By (A) allowing the prosecution to morph a § 371 (*defraud*) charge into a "§ 371 (US law)—§ 7201" charge (and into a § 7212(a) charge), (B) not recording Fleming's Response to Counsel's Second Motion to Withdraw in its Docket Sheet, (C) suggesting that Fleming "understands" a non-offense sufficiently so as to be able to enter a plea, (D) not setting aside a judgment that is based on a flagrantly self-breaching plea "agreement," and (E) affirming Fleming's sentence, which is based on SIX DISMISSED counts, including two criminal "employment tax" charges, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court and with relevant decisions of other courts of appeals, and

(2) so far departs from the accepted and usual course of judicial proceedings, and sanctions the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

By (A) allowing the prosecution to morph a § 371 (*defraud*) charge into a "§ 371 (US law)—§ 7201" charge (and into a § 7212(a) charge), (B) not correcting the plainly erroneous jury instruction, (C) upholding a jury verdict despite the complete absence of any evidence of *defrauding*, (D) affirming Arnold's sentence, which is based, in part, on DISMISSED counts (all of Plaintiff's numerics are based on DISMISSED counts, including the two criminal "employment tax" charges), and in part on charges *never filed*, and (E) affirming Arnold's sentence, which is based, exclusively, on information acquired post-trial, never agreed to, and never subjected to cross-examination, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court, with relevant decisions of other courts of appeals and even with it own precedent, and (2) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

And, by upholding *both* judgments at issue, despite the simultaneous punitive "taxation" and incarceration, which triggers double jeopardy protection, thus which requires the setting aside of *both* judgments, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court and with relevant decisions of other courts of appeals, and (2) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

Remedies Requested

1. Petitioners request that this Court grant the petition, issue the writ of certiorari and take jurisdiction of these matters.
2. Petitioners request release pending appeal.
3. Petitioners request reversal of the opinions on appeal, and, ultimately, reversal of the trial court judgments and sentences against them.
4. Should the Court identify additional issues for briefing, Petitioners request leave to submit such supplemental briefs.
5. Petitioners request the non-argument calendar. Oral argument is not expected to aid the resolution of these issues.
6. Petitioners request that costs be taxed to Respondent.
7. Petitioners request any and all other relief at law, in equity or sui generis to which they may show themselves justly entitled.

Respectfully submitted,

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